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Constitutional Law -- Special Privileges and Emoluments -- Race Track Franchise

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case. The greatest difficulty presented by the cases, however, is in justifying the subjective distinctions to the citizens of the United States. Why is physical assault any more violative of "due process of law," *or* antithetical to a concept of ordered liberty, *or* shocking to the conscience, *or* offensive of canons of decency and fairness, *or* restrictive of fundamental principles of liberty and justice, *or* offensive to human dignity, *or* brutal, *than* surreptitiously breaking and entering a private home, installing a microphone in a bedroom, boring a hole through the roof, connecting the microphone with a receiver, and listening to private conversations for approximately thirty days? That question the Supreme Court has not answered.

In place of "writs of assistance," or general search warrants, today we frequently have no warrants at all. Certainly the liberty of every man is not "in the hands of every petty officer," but it could be said that the liberty of Irvine was in the hands of the California police. True, Irvine was a criminal. But he was also a citizen of the United States. At his trial, "due process of law" could not command exclusion of incriminating evidence obtained by an unscrupulous intrusion of his privacy.

It seems that distant echoes of the words of James Otis can still be heard.

J. THOMAS MANN

Constitutional Law—Special Privileges and Emoluments—Race Track Franchise

In *State v. Felton*[1] the accused consented to become the test defendant, was arrested on August 29, 1953, and tried on a bill of information alleging that he "did unlawfully and wilfully place wagers and bets on a game of chance, to-wit: dog races conducted by the Carolina-Virginia Racing Association, Inc."[2] Judge Hubbard allowed defendant's motion to quash the bill of information for that by reason of the Currituck Act of 1949,[3] the bill failed to charge the commission of any crime. In so doing, the judge held the Act constitutional. That Act provided for a County Racing Commission which was authorized to grant a franchise to a person for the purpose of racing horses, dogs, or both horses and dogs.[4] "Pari-Mutuel Machines or Appliances"[5] were permitted, provided the qualified voters of Currituck County ratified the

[1] 239 N. C. 575, 80 S. E. 2d 625 (1954).
[2] State v. Felton, 239 N. C. 575, 577, 80 S. E. 2d 625, 627 (1954).
[3] N. C. SESS. LAWS 1949, c. 541.
[4] N. C. SESS. LAWS 1949, c. 541, § 2.
[5] ". . . a pari-mutuel system is well recognized as a system having no other purpose that that of providing the facilities . . . for placing bets, . . . whereby participants bet on the outcome of the races." State v. Felton, 239 N. C. 575, 582, 80 S. E. 2d 625, 630 (1954).

Act.[6] This Act was ratified, the franchise was given to the Carolina-Virginia Racing Association, and the track began operations a few miles from the Virigina line in the town of Moyock. Obviously, if the Act was constitutional and valid, no crime had been committed, and the lower court was correct in granting the motion to quash regardless of the fact that gambling has been held to be a crime.[7]

In reversing the lower court, the supreme court declared the Act unconstitutional as violative of Article I, Sections 7 and 31 of the North Carolina Constitution. Section 31 reads: "Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed."[8]

It is interesting to note, in passing, that failure to provide for successors to office in *Freeman v. Board of Commissioners,*[9] was held not a violation of Section 31, since the General Assembly was presumed to have power to terminate, change, or continue the appointment. In the principal case however, the mode of succession, even though clearly stipulated, was held incompatible with the constitutional section.[10]

The court placed more emphasis on the violation of Section 7, which provides: "No person or set of persons are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."[11] Relying on the axiom that "the fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it,"[12] counsel for the Carolina-Virginia Racing Association, as *amici curiae,* sought to persuade the court that this section of the constitution was never intended to apply to situations of this type.[13] An examination of the historical origin of this section to ascertain just what type of abuses were contemplated would seem to be appropriate.

Such a project is as difficult as it is interesting, since both the North Carolina Constitution and its bill of rights "were read paragraph by paragraph and discussed (in the convention of 1776) but no record was made of the discussion."[14] We are told, however, that "Article three

[6] N. C. SESS. LAWS 1949, c. 541, § 6.

[7] State v. Brown, 221 N. C. 301, 20 S. E. 2d 286 (1942); N. C. GEN. STAT. § 14-292 (1952).

[8] N. C. CONST. Art. I, § 31. This section was held to have been violated because: (1) the method of filling vacancies in the Racing Commission made possible a self-perpetuating membership on the Commission; (2) there was ample provision for voting the Act in, but no provision for voting it out; (3) the franchise was irrevocable except for failure to comply with rules not spelled out in the statute. State v. Felton, 239 N. C. 575, 586, 80 S. E. 2d 625, 633 (1954).

[9] 217 N. C. 209, 7 S. E. 2d 354 (1940).

[10] See note 8 *supra.*

[11] N. C. CONST. Art. I, § 7.

[12] Perry v. Stancil, 237 N. C. 442, 444, 75 S. E. 2d 512, 514 (1953).

[13] Brief for Carolina-Virginia Racing Association as *Amicus Curiae;* State v. Felton, 239 N. C. 575, 80 S. E. 2d 625 (1954).

[14] SIKES, TRANSITION OF NORTH CAROLINA FROM COLONY TO COMMONWEALTH 68 (1898).

of the North Carolina Declaration (now Art. I, Section 7, quoted *supra*) was copied verbatim from the 4th Article of the Virginia Declaration, with the ommission of the clause in the Virginia statement which denounced hereditary officers,"[15] an omission which would seem to be highly significant later in this discussion. Apparently, the "men were too busy to hesitate to copy verbatim what served their ends."[16] It is generally conceded that the Virginia Declaration of Rights was conceived and written by George Mason either in Raleigh Tavern, Williamsburg, without the aid of any reference materials, or in his own library utilizing Magna Charta, the English Petition of Rights, and various philosophical works.[17] Counsel, as *amici curiae,* contended in the principal case that Mason had in mind, "the abuse of absenteeism, the receipt of fees without the performance of services by public officers, hereditary office holding and the like," including "the establishing of a hereditary nobility or aristocracy possessing special privileges such as existed in England."[18] Thus such a grant of a franchise to operate pari-mutuel betting machines would not be within the purview of the section. Various biographers seem to substantiate this position. Brant says, "Mason's original draft covers the following topics:

". . . .

"4. no hereditary offices. . . ."[19]

Rowland contends: "The fourth article declares public service to be the title to public office and since the former is not descendible, neither should the latter be hereditary."[20]

But Hill summarizes the section so that it has a two-fold meaning: "Except in recognition of public service none shall have a privileged position in or emoluments from, the community, and no honors are to be hereditary."[21] Furthermore, if Mason intended to guard against only the specific evils of hereditary offices, titles of nobility, and public office malpractices, his composition of that idea into words certainly misled his colleague, Henry Lee, who observed upon reading the section: "If a deluge of despotism should sweep over the world and destroy those

[15] Ketcham, *The Sources of the North Carolina Constitution of 1776,* 31 NORTH CAROLINA HISTORICAL REVIEW 220 (1929). Section 4 of the Virginia Declaration of Rights reads: "That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary." II POORE, FEDERAL AND STATE CONSTITUTIONS 1909 (1878).

[16] SIKES, *op. cit. supra* note 14, at 69-70.

[17] I ROWLAND, LIFE, CORRESPONDENCE, AND SPEECHES OF GEORGE MASON, c. 7 (1892).

[18] Brief for Carolina-Virginia Racing Association as *Amicus Curiae,* p. 18; State v. Felton, 239 N. C. 575, 80 S. E. 2d 625 (1954).

[19] I BRANT, JAMES MADISON, THE VIRGINIA REVOLUTIONIST, n. 3, p. 427 (1941).

[20] ROWLAND, *op. cit. supra* note 17, at 245.

[21] HILL, GEORGE MASON 141 (1938).

institutions under which freedom is yet protected . . . could this single sentence of Mason's be preserved it should be sufficient to rekindle the flame of liberty and revive the race of freemen."[22] Such a high tribute would hardly be paid to a section directed at prohibiting specific abuses only. That the section is more of a general statement of the fundamental inalienable rights of man—equal rights to all, special privileges to none—is particularly clear when the equivalent section of the Pennsylvania Constitution, likewise modeled upon the Virginia Declaration,[23] is observed to read: "Government is . . . instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of a single man, family or set of men, who are part only of that community."[24] Regardless of exactly what Mason had in mind when he separated his section into two parts by means of a semicolon,[25] the section must have conveyed a two-fold meaning to its adopters: (1) no special privileges except in consideration of public service, and (2) no hereditary offices.

It is then significant to notice that in copying the Virginia Declaration, North Carolina chose to separate Mason's Section 4 into two sections: Section 7 quoted *supra,* which is violated in the principal case; and Section 30 pertaining to hereditary emoluments, which is not involved or invoked in this case. The only information bearing on the intention of the North Carolina framers of this section which has been observed reveals that "Section 7 is in harmony with the 3rd Article of the Mecklenburg Instructions which advised the representatives to 'oppose everything that leans to aristocracy or power in the hands of rich and chief men exercised to the oppression of the poor.' "[26]

If there ever was any doubt concerning the construction and applicability of this section, such uncertainty is not apparent in *Bank of New Bern v. Taylor,*[27] decided some thirty-seven years after the adoption of the State Constitution. In that case the contention was that the legislative act giving a bank a summary mode of collecting debts, *i.e.,* a special privilege, was violative of this section. In disposing of the argument, the court said that such an "objection will vanish when we reflect that this privilege is not a gift but the consideration for it is public good to be derived to the citizens at large from the establishment of the bank."[28]

[22] ROWLAND, *op. cit. supra* note 17, as quoted from LEE'S, REMARKS ON JEFFERSON 127 (1839).

[23] "The Massachusetts Bill of Rights and all succeeding instruments of the kind adopted by the different colonies were modeled upon the Virginia Charter and its principles were engrafted in the amendments of the Federal Constitution." ROWLAND, *op. cit. supra* note 17, at 250.

[24] II POORE, FEDERAL AND STATE CONSTITUTIONS 1541 (1878).

[25] See note 15 *supra.*

[26] KETCHAM, *op. cit. supra* note 15, as quoted from the Mecklenburg Instructions as found in 10 NORTH CAROLINA COLONIAL RECORDS 870a-870f (1890).

[27] 6 N. C. 266 (1813). [28] *Id.* at 267.

Although Section 7 was applicable, the particular legislation came within the exception clause, "in consideration of public service."

Subsequently, the court has relied on Section 7 to declare unconstitutional the following: charter provision exempting one tobacco warehouse corporation from liability for negligence when other warehouses did not enjoy such a privilege;[29] charter provision allowing a bank to charge excessive rates;[30] statute authorizing the depositors of certain defunct banks to sell their claims to debtors of the same bank;[31] statute imposing a license tax on some dry cleaners and allowing other dry cleaners to operate without this additional charge;[32] statute increasing the liability of sureties on contractor's bonds in Buncombe County only;[33] statute lessening the punishment for violating the prohibition laws in only five of the 100 counties;[34] and others.[35]

The court has refused to apply Section 7 to declare unconstitutional a grant of power of eminent domain to public service corporations because such is deemed within the exception, "but in consideration of public service";[36] a pension plan for school teachers because of the exception;[37] workman's compensation benefits for deputy sheriffs because of the exception;[38] and legislation to aid the veterans.[39]

The cases cited and others seem to indicate that special privileges will not be given to an individual corporation or person except "in consideration of public service." Such construction would not seem to be incompatible with the intention of the framers of that Section. The Currituck Act, which grants a single organization the privilege of violating a general law against gambling[40] while denying this privilege to others, legalizes gambling only on the premises of the franchise holder, and permits only the franchise holder and its patrons to violate the general law, is clearly granting a special privilege to a person[41] and is, therefore, unconstitutional.

[29] Motley & Co. v. Southern Finishing and Warehouse Co., 122 N. C. 347, 30 S. E. 3 (1898); Note, 27 N. C. L. REV. 528 (1949).
[30] Simonton v. Lanier, 71 N. C. 498 (1874).
[31] Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481 (1934).
[32] State v. Harris, 216 N. C. 746, 6 S. E. 2d 854 (1940).
[33] Plott Co. v. Ferguson Co., 202 N. C. 446, 163 S. E. 688 (1932).
[34] State v. Fowler, 193 N. C. 290, 136 S. E. 709 (1927).
[35] *E. g.*, Duncan v. City of Charlotte, 234 N. C. 86, 66 S. E. 2d 22 (1951); State v. Glidden Co., 228 N. C. 664, 46 S. E. 2d 860 (1948); and see NORTH CAROLINA MANUAL 1929 (Newsom ed.); and CONNOR AND CHESHIRE, THE CONSTITUTION OF THE STATE OF NORTH CAROLINA ANNOTATED (1911).
[36] Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 96 S. E. 99 (1918).
[37] Bridges v. City of Charlotte, 221 N. C. 472, 20 S. E. 2d 825 (1942).
[38] Towe v. Yancey County, 224 N. C. 579, 31 S. E. 2d 754 (1944).
[39] Brumley v. Baxter, 225 N. C. 691, 36 S. E. 2d 281 (1945).
[40] N. C. GEN STAT. § 14-292 (1952): "If any person play at any game of chance at which any money, property or other thing is bet, whether the same be in stake or not, both those who play and those who bet thereon shall be guilty of a misdemeanor."
[41] State v. Felton, 239 N. C. 575, 80 S. E. 2d 625 (1954).

On the other hand, counties as political subdivisions have been the recipients of privileges not enjoyed by other counties.[42] Apparently, "no person or set of persons" refers to persons who are under the same circumstances or conditions and does not refer to areas as such.[43] In *Salsburg v. Maryland,* Justice Burton said: "The equal protection clause relates to equality between persons as such rather than between areas."[44] That case would seem to be an acceptable summation of the law on equal protection sections of the state constitutions as well as that of the Federal Constitution. If the phrase, "no person or set of persons" is construed to include counties, then such familiar acts as those creating Alcoholic Beverage Control are also unconstitutional. These acts have not been declared so, although the attempt was made by a group of prominent citizens[45] when the ABC Acts were first enacted by the General Assembly.[46] It is true that in that case the court refused to rule on the constitutionality of the ABC Acts, saying that the question was not properly before the court,[47] but Alcoholic Beverage Control is still available on the county option plan in spite of the general prohibition law. Obviously, these Acts confer special privileges, but these privileges are directed to the county while the gambling Acts ultimately channel special benefits to individual persons or corporations,[48] and therein lies the important distinction. The court in the principal case anticipated the problem that would be created if a county itself or a private individual or corporation serving as an agency of the county operated racing enterprises, but the court found other ways to decide the issue without answering this more important question.[49]

In view of the fact that counties as political subdivisions of the state do not seem to be within the purview of Section 7, and considering the vast number of local legislative acts, including those creating Alcoholic Beverage Control, which are passed each session by the General Assembly, it would seem that a careful draft of legislation permitting counties

[42] *E.g.,* N. C. SESS. LAWS 1953, c. 135, An Act to Establish a Law Library for the Public Officials and Courts in New Hanover County; c. 715, An Act Authorizing Wilson County to Establish a Law Library; c. 1158, An Act to Establish a County Court Library in Cumberland County.

[43] N. C. CONST. Art. I, § 7; State v. Fowler, 193 N. C. 290, 135 S. E. 709 (1927), in which the court said: "This provision, we think, is a guaranty that every valid enactment of a general law applicable to the whole state shall operate uniformly upon persons and property, giving to all under like circumstances equal protection and security and neither laying burdens nor conferring privileges upon any person that are not laid or conferred upon others under the same circumstances or conditions."

[44] Salsburg v. State of Maryland, 346 U. S. 545 (1954).

[45] Newman v. Commissioners of Vance, 208 N. C. 675, 182 S. E. 453 (1935).

[46] N. C. PUB. LAWS 1935, cc. 418, 493.

[47] Newman v. Commissioners of Vance, 208 N. C. 675, 182 S. E. 453 (1935).

[48] State v. Felton, 239 N. C. 575, 588, 80 S. E. 2d 625, 635 (1954); N. C. PUB.-LOC. LAWS 1939, c. 540; N. C. SESS. LAWS 1949, c. 541.

[49] State v. Felton, 239 N. C. 575, 587, 80 S. E. 2d 625, 634 (1954).

to own and operate racing establishments wherein pari-mutuel betting is permitted could not be declared unconstitutional as violative of Section 7, Section 31, or any other section of the North Carolina Constitution. If this contention is accepted, then the responsibility for permitting dog and horse racing with its counterpart, pari-mutuel betting, to infiltrate the North Carolina scene rests solely upon the General Assembly.[50]

ROBERT D. LEWIS.

Credit Transactions—Conditional Sale Contracts—Default—Remedies of Buyer and Seller—Liability of Buyer on Check or Note Given as Down Payment or Installment Payment

In 1893 the North Carolina Supreme Court remarked that conditional sale contracts "are becoming greater in frequency and general interest. They are principally used in connection with the sale of sewing-machines, pianos, furniture, soda-fountains, rolling stock on railroads, and the like."[1] Today the frequency of such contracts is still increasing, and the list of products sold under them must be enlarged to include a variety of recently developed chattels, such as automobiles, television sets, home appliances, adding machines, and factory equipment.

A typical form of conditional sale contract involves the credit sale of personal property, where the buyer usually makes a down payment and undertakes, often by a promissory note, to pay the balance of the price in installments. Under the contract the buyer receives immediate possession of the property, and the seller retains title as security together with the accompanying right to repossession and resale in case of default,[2] but the buyer has the power to gain complete title by making full payment. It is explained that the seller's *retention* of title distinguishes this contract from a purchase money chattel mortgage where complete title is vested in the buyer who immediately *reconveys* security title to the seller.[3]

[50] For an excellent résumé of racetrack operations in North Carolina, see *Raleigh News and Observer,* February 14 through 18, 1951, a feature story in five chapters by Jim Chaney.

[1] Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 378, 383, 17 S. E. 174, 175 (1893). The instrument that caused this comment was entitled a "lease," requiring periodic "rentals" until title to a "soda water machine" was conveyed upon full payment, but the court held it was a conditional sale contract.

[2] Earlier notes have stated that in North Carolina the secured party under a conditional sale contract has the right to repossession *before* default, unless the parties manifest a contrary intention by agreement or conduct, and all the writers suggest that this is undesirable. Notes, 21 N. C. L. REV. 387 (1943); 12 N. C. L. REV. 254 (1934); 11 N. C. L. REV. 321 (1933).

[3] Frick & Co. v. Hilliard, 94 N. C. 117, 119 (1886); Gaul v. Goldburg Furniture & Carpet Co., 85 Misc. 426, ———, 147 N. Y. Supp. 516, 518 (Sup. Ct. 1914); Bogert, *The Evolution of the Conditional Sales Law in New York,* 8 CORNELL L. Q. 303, 304 (1923).

However, the North Carolina court, in construing N. C. LAWS 1883, c. 342,